STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
(Sawyer P.J., Smolenski and Murray JJ.)

BRUCE B. FEYZ, an Individual,

Plaintiff-Appellees,

v

MERCY MEMORIAL HOSPITAL, MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.

Defendants-Appellants.
_____/

Supreme Court
No.: 128059

Court of Appeals
Case No.: 246259

Monroe County Circuit Court
Court Case No.: 02-14174-CZ

REPLY BRIEF FOR DEFENDANTS-APPELLANTS MERCY MEMORIAL HOSPITAL, MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.

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STATEMENT OF FACTS

Plaintiff's Counterstatement of Facts is without sufficient or appropriate citation to the record. Further, many of the factual assertions made by plaintiff go beyond any fair inference from the allegations in the complaint.

ARGUMENT

In his brief on appeal plaintiff focuses extensively on the facts in arguing there was malice, and that peer review immunity and/or HPRP immunity does not apply. Fundamentally, however, defendants submit that, at best, it remains for the record to be developed in the trial court as to the factual foundation for all of these issues (to the extent they are issues), or alternatively, for a determination that a factual foundation cannot be established because of the limitations of peer/professional review confidentiality under MCL 333.20157, MCL 333.21515, and MCL 331.533.

Rather, the critical issues before this Court are those of fundamental law and policy that will affect not merely this suit, this Hospital, and this Medical Staff and administrative and medical staff members, but all hospitals and medical staff members throughout the State of Michigan for decades into the future. In evaluating these issues, defendants respectfully request that the Court look beyond the facts alleged in the complaint, and consider the overriding importance to Michigan's healthcare system of the continued viability of the doctrine of judicial nonreview, and of peer review immunity, as traditionally defined and applied by the appellate Courts of this state for decades. Upon such an analysis, defendants submit that the legal principles espoused by the Court of Appeals' decision in this matter must be disavowed by this Court.

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I

THE MICHIGAN COURT OF APPEALS MAJORITY ERRED IN DEFYING MCR 7.215(J)(1), STARE DECISIS, AND COMPELLING PUBLIC POLICY CONSIDERATIONS WHEN IT IGNORED LONGSTANDING, UNWAVERING PRECEDENT THAT CONTRACT AND RELATED TORT CLAIMS THAT REQUIRE COURTS TO INQUIRE INTO A HOSPITAL'S MEDICAL STAFFING DECISIONS ARE NOT SUBJECT TO JUDICIAL REVIEW.

The factual issues in this case raised by plaintiff's allegations, and the relief plaintiff has demanded, will unacceptably immerse the trial and appellate courts and lay jury deeply into patient care issues and the peer review processes within this Hospital. Plaintiff's assertion that the courts, and potentially, a jury, will not be asked to determine the answer to any medical question in this matter, and that plaintiff "does not seek injunctive relief ordering that he be permitted to give any particular instruction to Hospital nurses," is not correct. Plaintiff's complaint demands extensive injunctive relief, including "injunctive relief proscribing defendants from taking any disciplinary action against a medical staff member based on that member including in patient records information relevant to the care of the patient including documentation of errors or potential errors in medical care, requesting that a case be referred for investigation, or requesting that the findings of the investigation be made available to the patient's physician." (Apx 61a).

Plaintiff is incorrect in suggesting that the Court of Appeals in Derderian v Genesys Health Care Sys, 263 Mich App 364, 374; 689 NW2d 145 (2004), began to move away from the judicial nonreview doctrine. Rather, the Court in Derderian expressly found it unnecessary to address the applicability of the doctrine, choosing to address instead alternate grounds ("Rather than addressing plaintiffs' claim that the trial court erroneously applied the judicial nonintervention doctrine to the second amended complaint, we choose to resolve this case on certain alternate grounds relied on by the

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trial court and challenged on appeal by plaintiffs.") The only analysis of the nonreview doctrine offered by the Court was the determination that it was a doctrine of judicial restraint rather than one of subject matter jurisdiction. That determination is completely consistent with defendants' position here.

Plaintiff's assertion that in consulting legal counsel, the defendant physicians were concerned that their actions were ill-conceived (brief, p 46), is without merit. The fairer inference is that they were concerned that they would be sued by Dr. Feyz if they took any action--the basic premise of the nonreviewibility doctrine (as well as peer review and HPRP immunity). If physicians are not protected when participating in the peer review process, why would they ever agree to do so and place themselves at risk for being personally sued?

* * *

II

ALL OF THE DEFENDANTS ARE (OR UPON REMAND AND FURTHER DEVELOPMENT OF THE RECORD BELOW, WILL BE) ENTITLED TO PEER REVIEW IMMUNITY UNDER MCL 331.531, AND PLAINTIFF'S ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

It is and has been defendants' position throughout this matter, from the time of moving for summary disposition through the appeal, that dismissal of all defendants was warranted based on peer review immunity, in the absence of malice. It was sufficient, for purposes of presenting their position on appeal, that defendants as appellees, argued that, individually and collectively, all were entitled to immunity. To the extent plaintiff has alleged in the complaint allegations that any of the defendants were not "duly appointed" members of a peer review committee, there exist, at best, preliminary factual issues that must be addresses by discovery and materials outside of the complaint.

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Additionally, plaintiff's argument that the individual defendants, Dr. Miller and Richard Hiltz, are not entitled to immunity is also without merit given their roles in this matter. Dr. Miller is specifically alleged and acknowledged by plaintiff to be Chairman of the Executive Committee. Mr. Hiltz, as the Administrator and President of the Hospital, was also an ex officio member of the Executive Committee under the express provisions of the Medical Staff Bylaws (although not specifically alleged by plaintiff, this is established in section 12.2-1 of the Bylaws, among others). Should this Court (or on remand, with further factual development as may be necessary, the trial court) determine that the Executive Committee is a peer review committee within the meaning of MCL 331.531, then both Dr. Miller and Mr. Hiltz, as members of that Committee, clearly would be entitled to the same immunity.

Similarly, to the extent they participate in the peer review/corrective action process in accord with responsibilities imposed by the hospital and medical staff bylaws and MCL 333.21513, the Medical Staff and Hospital Board of Trustees necessarily would be acting as duly appointed peer review committees and entitled to statutory immunity. The peer review obligation is statutorily imposed on the owners and operators of hospitals, and the medical staff, by MCL 333.21513. The medical staff is fundamentally a division of the hospital formed under the hospital licensing act, MCL 333.21513. The hospital acts through its Board of Trustees upon the recommendation of the medical staff and its committees such as the Executive Committee. As the hospital, in granting or denying staff privileges, can only act by or through its medical staff committees (which clearly constitute duly appointed peer review committee), the immunity provisions clearly and necessarily applied to hospital credentialing decisions. The Board of Trustees, that by definition is the hospital corporation, is itself the

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"supreme" or final peer review committee in acting upon the recommendations of the committees of and for the Medical Staff itself.

Plaintiff's argument that the members of Executive Committee were not "duly appointed" with regard to its actions in 2000 because plaintiff did not first get a hearing before other peer review entities (brief, pp 29-30), erroneously expands a statutory requirement of "due appointment" of individual members to procedural with the process afforded. In any event, this again at most creates by mere allegation the potential for preliminary issues of fact that would need to be resolved on a developed factual record, or rejected if no such record can be developed either because of peer review confidentiality, or a lack of factual support.

Plaintiff's argument that the Court of Appeals erred in concluding that the Ad Hoc Committee was a peer review committee entitled to immunity under MCL 333.531 (brief, pp 27-28), is not properly before this Court. Plaintiff did not file an application for leave to cross appeal from the Court of Appeals' judgment affirming summary disposition of the claim of invasion of privacy in Count V as to the Ad Hoc Committee based on peer review immunity. As such, plaintiff may not here seek to disturb that judgment. Malcolm v City of Detroit, 437 Mich 132, 147-148; 468 NW2d 479 (1991).

Moreover, the Court of Appeals correctly held that it was clear that the Ad Hoc Committee was in fact a duly appointed peer review committee. The Bylaws specifically provide for the appoint ment of a special committee to make an investigation regarding potential corrective action (Apx 109a, Article 7.1-3.)

Without merit is plaintiff's argument that medical staff "disciplinary proceedings"--proceedings by peer review committees to investigate and determine whether discipline of a physician is appropriate--are not properly considered "peer review." First, this

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argument has no support in logic or common sense. The discipline of medical staff members who threaten patient safety or the efficient and effective provision of patient care in the hospital because of irrational or negligent or unprofessional actions is precisely the heart and ultimate goal of the entire peer review process. How else would a hospital, through its medical staff, meet the mandate of MCL 333.21513(c) and (d) to ensure physicians admitted to the hospital are granted privileges consistent with their qualifications, and assure effective review by the medical staff of professional practices within the hospital to reduce morbidity and mortality and Improve patient case? Review of hospital staff without the power to enforce corrective action to correct findings of poor patient care or misconduct through discipline up to and including suspension or revocation of privileges, would be meaningless.

Plaintiff's argument also has no support in law. Plaintiff misplaces reliance on the conclusory statement from Davis v O'Brien, 152 Mich App 495; 393 NW2d 914 (1986), that "If the bylaws provide that the purpose of the review function is to mete out discipline to physicians providing inadequate health care, then that part of the review conducted by the reviewing entity is not protected by the statutory privilege found in § 21215 [sic]." First, this statement evidently regards the confidentiality provision of MCL 333.21515, applicable to facts and data collected by an individual or committee assigned a professional review function specifically provided in Article 17 of the Public Health Code. The Court of Appeals in Davis was not considering any question related in any way to the meaning of a "peer review committee" for purposes of the peer review entity immunity or confidentiality statutes, MCL 331.531, MCL.533.

Further, this statement by the Court in Davis was made without citation to authority, without any kind of analysis, and, frankly, simply makes no sense whatsoever.

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As noted, discipline and corrective action is the culmination of the professional review process. It is the only way to make that process meaningful.

Perhaps, although it is not at all clear, the Court of Appeals in Davis was suggesting a distinction in application of the professional review confidentiality provision in section 333.21515 between facts and data collected on the one hand, and the action of a professional review committee based on those facts and data on the other hand. If so, and regardless of the validity of that analysis, that distinction cannot apply to the peer review entity statute confidentiality provision, MCL 331.533. MCL 331.533 extends confidentiality beyond the "facts and data collected," to the "record of a proceeding, and the reports, findings and conclusions of a review entity."

Also misplaced is plaintiff's reliance on Marchand v Henry Ford Hospital, 398 Mich 163; 247 NW2d 280 (1976), and Monty v Warren Hospital Corp, 422 Mich 138; 366 NW2d 198 (1985). In Marchand, this Court held, simply, that for information to be confidential under the peer review confidentiality protections, it had to have been collected initially for peer review purposes. In Monty, the Court held that confidentiality should be determined by in camera review to determine if the information had been collected by a committee with an assigned review function for purposes of retrospective review. The principles set forth in these cases have no relevance to the issues in this appeal.

Without merit is plaintiff's argument that because peer review immunity is an affirmative defense, plaintiff does not need to plead it in the complaint (Brief, p 33). Plaintiff did not below sufficiently advance this argument in the Court of Appeals. Plaintiff's argument and statement of the issue in the Court of Appeals was, simply, that "The Complaint Sufficiently Alleges Malice." (Argument III heading, plaintiff's Court of

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Appeals brief, p 39; see also plaintiff's statement of issue 8). Plaintiff's one-paragraph argument in the Court of Appeals that plaintiff was not required to plead the absence of immunity (Court of Appeals Brief, p 42), was insufficient to raise the issue, an issue not addressed by the Court of Appeals.

Where the factual allegations in the complaint evidence an absence of any factual basis for malice, as defendants submitted was the case here, a determination that immunity applies is appropriate, regardless of whether immunity is an affirmative defense. In any event, at a minimum, if plaintiff's position is correct and preserved, this would merely mean that the matter should be remanded for further factual development and discovery, and a motion by defendants under MCR 2.116(C)(7) based on evidence outside the pleadings.

III

ALTERNATIVELY PLAINTIFFS' TORT AND CIVIL RIGHTS CLAIMS AGAINST THE EXECUTIVE COMMITTEE AND OTHER DEFENDANTS PREMISED ON THE HPRP REFERRAL ARE NOT REVIEWABLE DUE TO DEFENDANTS' IMMUNITY FROM LIABILITY PURSUANT TO MCL 333.16244 (1) FOR REPORTING PLAINTIFF'S CIRCUMSTANCES TO THE HEALTH PROFESSIONAL RECOVERY PROGRAM.

Plaintiff's argument that he need not plead facts in avoidance of immunity is unpersuasive with regard to the immunity provided under the HPRP. There is by statute a presumption of good faith. Where the facts pled do not overcome that presumption, immunity applies based upon the fact of the complaint.

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RELIEF REQUESTED

WHEREFORE defendants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O. and Anthony Songco, M.D., respectfully request that this Honorable Court hold that:

(1) The judicial nonreview doctrine remains valid and precludes judicial review of plaintiff's common law contract and tort claims, and to the extent the Court of Appeals decision is to the contrary, it is reversed;

(2) Whether a civil rights claim involves malice sufficient to avoid immunity under MCL 331.531, must be determined on a case-by-case basis and in the absence of any per se rule;

(3) The "malice" exception to peer review immunity under MCL 331.531 should continue to be defined in accord with the common law defamation definition followed by Michigan Courts since Veldhuis v Allan, 164 Mich App 131; 416 NW2d 347 (1987), Regualos v Community Hospital, 140 Mich App 455; 364 NW2d 723 (1985);

(4) In the absence of such malice, peer review immunity applies to all of the defendants to the extent they were determined by the Court of Appeals to be, or on remand are shown by further factual development to be, duly appointed peer review committee;

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(5) With the statutory presumption of good faith, and in the absence of sufficient allegations or, alternatively, sufficient proof of bad faith, defendants are or will be entitled to immunity from plaintiff's civil rights and tort claims for the HPRP referral pursuant to MCL 333.16244(1).

Respectfully submitted,

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Dated: April 27, 2006

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